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No. 06-242

In The
Supreme Court of the United States

MINING AND MINERALS DIVISION OF THE NEW MEXICO ENERGY MINERALS AND NATURAL RESOURCES DEPARTMENT, et al.,

Petitioners,

v.

EDWINA MANNING, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Mexico

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the decision of the New Mexico Supreme Court does not conflict with this Court's Takings Clause jurisprudence, with this Court's decision in *Alden v. Maine,* 527 U.S. 706 (1999) or with any decisions of another state court of last resort or of the United States Court of Appeals.

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INTRODUCTION

The Petitioners have requested this Court to review a decision by the New Mexico Supreme Court that recognizes the right of private citizens to sue the State in state court for just compensation when the State takes private property for public use. The Court below held that the State cannot invoke the doctrine of sovereign immunity to prevent private citizens from bringing such suits because the right of just compensation is guaranteed by the Takings Clause of the Fifth Amendment of the United States Constitution, as applied to the States by the Fourteenth Amendment. The Petitioners, who are regulatory agencies of the State of New Mexico, argue that the decision below is contrary to this Court's decision in *Alden v. Maine,* 527 U.S. 706 (1999) and that the doctrine of sovereign immunity acts as a bar against claims for just compensation against the State in the state courts. After reviewing this Court's Takings Clause precedent, the *Alden* decision and other court decisions addressing the same question, the New Mexico Supreme Court held that "the Takings Clause creates a cause of action against a state which is actionable in state court and to which the state may not assert immunity" and that the *Alden* decision does not change the historical application of the Takings Clause to the States. (Petitioners Appendix (App.) 17, ¶32 and 20, ¶37).

The New Mexico Supreme Court's decision recognized the State's obligation, under the Fifth and Fourteenth Amendments, to pay just compensation for the taking of private property, which is a long-standing requirement established by this Court. Other state courts which have addressed the relationship between the just compensation requirement and state sovereign immunity have also found that sovereign immunity is not a bar to a takings

claim brought in state court. State courts in Oregon and South Dakota, as well as the Sixth Circuit Court of Appeals, have directly addressed the effect of the *Alden* decision on state sovereign immunity for just compensation claims. All three courts determined, as did the New Mexico Supreme Court, that *Alden* does not extend a State's sovereign immunity to bar claims for just compensation brought pursuant to the Fifth and Fourteenth Amendments. The New Mexico Supreme Court's decision is not in conflict with decisions from Federal or state courts or any decisions of this Court.

The Petitioners have failed to demonstrate that the decision of the New Mexico Supreme Court conflicts with any decisions of another state court of last resort or of the United States Court of Appeals or with any United States Supreme Court precedent. *See* Sup. Ct. R. 10. Petitioners have presented no "compelling reasons" for granting their Petition for Writ of Certiorari and the Petition should be denied.

ARGUMENT

I. The New Mexico Supreme Court's decision is consistent with the self-executing nature of the Takings Clause and does not conflict with decisions of this Court or other state courts.

The Mannings sued the Petitioners in state district court for regulatory takings pursuant to the Takings Clause of the Fifth Amendment. It has long been established that the Takings Clause is "applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897) [and] prohibits the

government from taking private property for public use without just compensation." *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001). This Court has also long recognized that, in addition to physical occupation, a takings may occur through state regulatory action. As Justice Holmes stated, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The Takings Clause creates an individual right to the remedy of just compensation and the States are required to provide "reasonable, certain and adequate provision for obtaining compensation." *Williamson Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194 (1985) (quoted authority omitted); *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 321 (1987). The purpose of the Takings Clause is to ensure that, in the event private property is taken by the government for public use, the property owner will be provided just compensation for the property so taken. The payment of just compensation is a Constitutional remedy that is fundamental to the protection of private property rights and is a specific limitation on governmental power. As explained in *First English,* the Takings Clause

> does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes it clear that it is designed not to limit the government interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily

> implicates a constitutional obligation to pay just compensation.

482 U.S. at 314-15.

The Takings Clause is self-executing and the right to claim just compensation does not require the passage of any type of legislation, either by Congress or by the States, in order for it to be enforceable. Once a taking occurs, the government entity that took the property, whether it be local, state or federal, is required by the Constitution to pay just compensation. As explained by Justice Brennan,

> [a]s soon a private property has been taken, whether through formal condemnation proceedings, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered . . . This Court has consistently recognized that the just compensation requirement of the Fifth Amendment is not precatory: once there is a 'taking,' compensation must be awarded.

San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 654 (1981) (Brennan dissenting). Justice Brennan explained that, although the Constitution "does not embody any specific procedure or form of remedy that the States must adopt," it does require "that the landowner must be able meaningfully to challenge a regulation that allegedly effects a 'taking,' and recover just compensation if it does so. He may not be forced to resort to piecemeal litigation or otherwise unfair procedures in order to receive his due." *Id.* at 660 (citations omitted).

The Court in *First English* followed Justice Brennan's dissent and found that the Takings Clause is self-executing and just compensation is required if a taking occurs. The Court explained that it has long been recognized "that a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation . . . [T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." 482 U.S. at 315-16.

Because the just compensation clause is self-executing, an individual may sue the government for just compensation, sovereign immunity notwithstanding. *See First English,* 482 U.S. at 316 n.9 (rejecting the United States government's argument that sovereign immunity principles compel the conclusion that the Takings Clause does not provide a damages remedy); *Hendler v. United States,* 952 F.2d 1364, 1371 (Fed.Cir. 1991) (noting that because a federal takings suit is "based upon the constitutional provision protecting property rights, and the provision was considered to be self-executing with respect to compensation, it escaped the problems of sovereign immunity"); *DLX, Inc. v. Commonwealth of Kentucky,* 381 F.3d 511, 527 (6th Cir. 2004) (*First English* makes clear that the Fifth Amendment Takings clause is a self-executing remedy, notwithstanding sovereign immunity). In the *DLX* decision, the Sixth Circuit cited to numerous authorities that have found "that the Fifth Amendment's requirement for just compensation forces the states to provide a judicial remedy in their own courts, the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Id.* As the *First English* Court explained, "many provisions

of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." 482 U.S. at 321.

Since determining, in *First English,* that the Takings Clause is self-executing, the Court has heard just compensation claims directed against a State or state entity. *Palazzolo v. Rhode Island,* 533 U.S. 606 (2000); *Brown v. Legal Foundation of Washington,* 123 S.Ct. 1406 (2003); *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 829 (1987); *Lucas v. South Carolina Coastal Council,* 112 S.Ct. 2886 (1992); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 122 S.Ct. 1465 (2002). In *Palazzolo, Brown,* and *Tahoe-Sierra,* all decided after *Alden,* the Court specifically stated that the Takings Clause applies to the States through the Fourteenth Amendment, thus reinforcing the conclusion that incorporation of the self-executing Takings Clause in the Fourteenth Amendment waived the states' sovereign immunity. *Palazzolo,* 533 U.S. at 617; *Tahoe-Sierra,* 122 S.Ct. at ftnt 1; *Brown,* 123 S.Ct. at ftnt 6 (each citing to *Chicago B. & Q. R. Co.*). There are no Supreme Court decisions, either before or after *Alden,* that indicate that the doctrine of sovereign immunity bars claims for just compensation brought against a State in state court.

The decision below, by recognizing the right of the Mannings to bring a claim of just compensation against the State in state court, is consistent with the Constitutional requirements and with the precedent of this Court. By holding that sovereign immunity does not act as a bar to claims for just compensation, the Court's decision provides the Mannings, and other similarly situated parties in New Mexico, the "opportunity to challenge a

regulation that allegedly effects a taking, and recover just compensation if it does so," as required by the decisions of this Court. *San Diego Gas & Electric Co.,* 450 U.S. at 660. The Court correctly recognized that, if the Petitioners were allowed to invoke the doctrine of sovereign immunity to bar claims for just compensation, "then the private individual is without a remedy in state court, even though both the State and Federal Constitutions obligate the State to pay." (Petitioners App. 10, ¶20). Rather than creating a "new constitutional damages remedy," as alleged by the Petitioners, the decision below ensures that private citizens have a means to pursue just compensation for the taking of private property by the State, which is exactly the remedy provided by the Constitution.

Other state courts that have addressed the question of whether sovereign immunity prohibits takings claims against the State in state court have reached the same conclusion as the New Mexico Supreme Court. The courts of Oregon, South Dakota, Nevada, Connecticut, Utah, Louisiana, Virginia, Wisconsin and New Hampshire have all held that sovereign immunity is not a defense to takings claims, based either on the Takings Clause or on similar state constitutional provisions, brought against the State in state court. *Boise Cascade Corp. v. State,* 991 P.2d 563 (Ore. 1999); *SDDS, Inc. v. State,* 650 N.W.2d 1 (S.D. 2002); *Benson v. State,* 710 N.W.2d 131 (S.D. 2006); *Alper v. Clark County,* 571 P.2d 810 (Nev. 1977) (Takings Clause is self-executing against the state); *Tamm v. Burns,* 610 A.2d 590 (Conn. 1992) (sovereign immunity not a defense to claims for just compensation arising under the state constitution); *Heughs Land, L.L.C. v. Holladay City,* 113 P.3d 1024 (Utah 2005) (state constitutional requirement of just compensation for a taking is self-executing and

therefore not barred by state sovereign immunity); *Avenal v. State,* 886 So.2d 1085 (La. 2004) (same); *Bell Atlantic-Virginia, Inc. v. Arlington County,* 486 S.E.2d 297 (Va. 1997) (same); *Wisconsin Retired Teachers v. Wisconsin Educ. Assoc.*, 558 N.W.2d 83 (Wis. 1997) (same); *Sibson v. State,* 282 A.2d 664 (N.H. 1971) (same). The decision of the New Mexico Supreme Court is consistent with the decisions of other state courts that allow private parties to sue the State for just compensation in state court.

II. The New Mexico Supreme Court's decision does not conflict with this Court's decision in *Alden v. Maine.*

The New Mexico Supreme Court's conclusion that *Alden* "did not alter the historical practice of applying the Takings Clause to the states, and nothing in that opinion permits a state to bar a claim for 'just compensation' from its courts" (Petitioners App.17, ¶32) is consistent with both the *Alden* decision itself and with decisions from Oregon, South Dakota and the Sixth Circuit, which have addressed the same issue.

The *Alden* decision concerned the authority of Congress, pursuant to its powers under Article I of the Constitution, to subject the States to private suits in state court. 527 U.S. at 710 ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state court"). The Court in *Alden* acknowledged the difference between claims asserted against a State under a Congressional statute and claims asserted based on obligations arising under the Constitution. *Id.* at 740. While state constitutional sovereignty is a right the States "retain today," that right can be

"altered by the plan of the Convention or certain constitutional amendments." *Id.* at 713. In addressing the scope of a State's sovereign immunity, the *Alden* Court stated:

> The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by the obligations imposed by the Constitution and by federal statutes that comport with constitutional design . . . Sovereign immunity, moreover, does not bar all judicial review of state compliance with the Constitution and valid federal law. Rather, certain limits are implicit in the constitutional principle of state sovereign immunity.

Id. at 754-55. The Fourteenth Amendment, through which the Takings Clause is made applicable to the States, "required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution . . . By imposing explicit limits on the powers of the States and granting Congress power to enforce them, the Amendment fundamentally altered the balance of state and federal power struck by the Constitution." *Id.* at 756. This Court, in *Alden,* recognized that the Fourteenth Amendment is a specific limitation on state authority. As already discussed, the self-executing nature of the Takings Clause means that Congressional action is not required to enable private parties to sue to enforce the right to just compensation. The discussion in *Alden* supports the conclusion that, based on the specific limitations of state power imposed by the Fourteenth Amendment, a State may be sued in state court for just compensation.

In *Palazzolo,* decided two years after *Alden v. Maine,* the property owner sued the State of Rhode Island for the taking of his property without just compensation in violation of the Fifth Amendment to the United States Constitution. While there were a number of concurring and dissenting decisions, all of the Justices agreed that, if the State of Rhode Island took Mr. Palazzolo's property without paying him compensation, his remedy was to sue the State for a takings under the Fifth Amendment. Justice Kennedy, delivering the Opinion of the Court, stated that "[t]he Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897), prohibits the government from taking private property for public use without just compensation." 533 U.S. at 617. Throughout the opinion, the Court discusses the application of the Takings Clause to States and state agencies. For example, the Court explained that the "Takings Clause ... in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation." *Id.* at 627. Justice O'Connor, concurring, discussed the takings issue in terms of state power over property rights. *Id.* at 632. Justice Stevens stated that, "[t]hough States and local governments have broad powers to adopt regulations limiting land usage, those powers are constrained by the Constitution and by other provisions of state law ... A taking is a discrete event, a government acquisition of private property for which the state is required to provide just compensation." *Id.* at 638.

In an attempt to circumvent or limit its duty to pay just compensation under the Takings Clause, the State of

Rhode Island argued that a current property owner could not bring a takings claim based on a regulatory enactment that had been passed before he acquired the property. *Id.* at 626. The Court rejected the State's argument, finding that, under the State's reasoning, "the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id.* at 627. Explaining that the State may not "secure a windfall for itself" by avoiding a takings claim, the Court quoted an earlier decision in which it was held that a state, based on its interpretation of the law, "may not transform private property into public property without compensation." *Id.* (Citing to *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980). The Court also stated that "[a]ssuming a taking is otherwise established, a State may not evade a duty to compensate on the premise that the landowner is left with a token interest." *Id.* at 631. The Supreme Court unequivocally rejected the attempt by the State of Rhode Island to limit its duty to pay just compensation under the Fifth Amendment.

The decision of the New Mexico Supreme Court below is consistent with this Court's recognition in *Alden* that sovereign immunity "does not bar all judicial review of state compliance with the Constitution and valid federal law" and that specific provisions of the Constitution, such as the Fourteenth Amendment, impose certain limits on state action and state sovereign immunity. 527 U.S. at 754. The decision is also consistent with this Court's

statements in *Palazzolo* that a State may not take private property without paying just compensation and may not limit its duty to pay just compensation under the Fifth Amendment.

The Oregon and South Dakota state courts and the Sixth Circuit Court of Appeals have also concluded that *Alden* does not bar claims for just compensation against a State in state court. The Sixth Circuit found that "a close reading of *Alden* reveals that it would present no bar" to takings claims against States in their own courts. *DLX*, 381 F.3d at 527. Sovereign immunity is not a bar to claims against the State because the Constitution requires the State to provide the remedy of just compensation in its own courts. *Id.* The Oregon Court of Appeals concluded that "*Alden* should not be read so broadly as to dictate that states may not be sued in state courts on federal takings claims unless they have specifically waived their sovereign immunity." *Boise Cascade Corp. v. State,* 991 P.2d at 568. Based on the self-executing nature of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, the Oregon Court held, as did the New Mexico Supreme Court, that "a state may be sued in state court for takings in violation of the federal constitution." *Id.* In 2002, the South Dakota Supreme Court reached the same conclusion, which it reiterated in 2006. *SDDS, Inc. v. State,* 650 N.W.2d at 8-9; *Benson v. State,* 710 N.W.2d 131.

The New Mexico Supreme Court's determination that the decision in *Alden* does not change the applicability of the Takings Clause to the States and that nothing in the opinion allows the States to rely on the doctrine of sovereign immunity to bar claims for just compensation in state courts is consistent with both this Court's discussion in

Alden and with decisions of other state and federal courts which have addressed the issue.

III. The position advocated by the Petitioners would leave the citizens of the State of New Mexico without the right to sue the State for just compensation for regulatory takings, in direct violation of the rights guaranteed by the Constitution.

If the position taken by the Petitioners were to prevail, there would be serious impacts on both the citizens of the State and potentially the State itself. The result of the such a decision would be to leave the citizens of New Mexico without constitutional protection against the uncompensated taking of private property, which is one of the fundamental rights guaranteed by the United States Constitution. Additionally, because the Supreme Court has held that a State must provide just compensation when private property is taken, if the State cannot be sued for just compensation for regulatory takings, and thus does not provide a remedy, there is a risk that the legislature will be prevented from enacting statutes that impact private property rights.

As recognized by the New Mexico Supreme Court, the position taken by the Petitioners creates an untenable paradox. (Petitioners App. 10, ¶20). Under existing New Mexico law, the State can be sued for just compensation when private property is taken pursuant to the power of eminent domain. (*Id.*, ¶19). In the proceedings below, the Petitioners acknowledged that, if an agency with the power of eminent domain takes private property for public use, the State must pay just compensation. However, the Petitioners would deny private individuals, who are

subject to regulatory takings by agencies that do not have the power of eminent domain, the right to sue the State in state court for just compensation, even though the Constitution obligates the State to pay. Recognizing the potential effect of the Petitioners position, the New Mexico Supreme Court stated:

> If we were to relieve the state from paying for takings when agencies do not have statutory eminent domain authority, then paradoxically we would bar practically every regulatory taking claim against a state agency. A regulatory takings claim, by definition, does not invoke eminent domain powers because the state claims only to regulate the use of land and not to condemn its title. But the protections of the Fifth Amendment do not rest on such formalistic distinctions. A regulatory taking can be just as devastating to property rights as a taking by eminent domain, and the right of the landowner to compensation is just as central to the promise of the Bill of Rights in either instance.

(Petitioners App. 11, ¶22). The Court's decision allowing private citizens to sue the State in state court for just compensation pursuant to the Fifth and Fourteenth Amendments ensures that the property rights of all citizens of the State of New Mexico will be afforded the protection promised by the United States Constitution.

CONCLUSION

The Petitioners have failed to establish any compelling reasons for this Court to grant the Petition for Writ of Certiorari. The decision below does not conflict with any

decisions of this Court, or with any decisions of a Federal Court of Appeals or a state court of last resort. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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